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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

VONZELL RUDOLPH GLASS,

Defendant and Appellant.

C049128

(Super. Ct. No. 04F08633)

A jury found defendant Vonzell Rudolph Glass guilty of assault with a firearm, possession of a firearm by a convicted felon, carrying a concealed weapon, and negligent discharge of a firearm. In a bifurcated proceeding, the trial court found true the allegations that defendant had three prior convictions and sentenced him to a total of 17 years in state prison.

Defendant raises three errors on appeal. First, he contends the trial court erred in denying his motion to suppress evidence because he was subject to a prolonged detention and unconstitutional search. Second, defendant argues the prosecutor committed misconduct during closing argument. Third,

he asserts there was insufficient evidence for the trial court to find that he had a prior felony conviction. Because we find no merit in any of these arguments, we will affirm.

#### FACTS

On September 30, 2004, Tracy Washington, a dispatcher for the Sacramento County Sheriff's Department, received a call from a person identifying herself as Niko. Niko told Washington she had seen "a black male shooting at another male." She described the shooter as "[a] black male adult, mid 30s and five nine, heavy, wearing a black leather jacket," dark jeans, and leaving in a black Mustang. Niko also said "that this individual lived in the same apartment complex in apartment number eight." She knew the suspect was from apartment No. 8 because they previously had problems in the complex with the same person. Niko told Washington that she was in apartment No. 11. Washington received the description of the shooter at 1:13 a.m.

Deputy Sheriff Dean McCowan was working as a patrol officer on September 30, 2004. At approximately 1:10 or 1:11 a.m., he was dispatched to a shooting that took place near Fulton Avenue and Hurley Way. He received the following description of the suspect responsible for the shooting: "Black, male adult, approximately five seven to five eight in height, heavy build, in his 30s, wearing black leather jacket and dark jeans." Between approximately 1:22 and 1:25 a.m., Deputy McCowan and three other deputies arrived at the apartment complex and checked the parking lot for the suspect vehicle -- a black Mustang -- described by the 911 caller. The deputies did not

proceed to the 911 caller's apartment because of its proximity to apartment No. 8, the apartment linked to the suspect.

The deputies encountered only two people while exploring the parking lot -- a male and a female who were walking from the back of the complex east toward Fulton Avenue. Deputy McGowan testified the male was a black adult "wearing a long black leather coat, dark shirt, and dark jeans" five feet seven inches to five feet nine inches tall with a heavy build. He later identified defendant as the male suspect.

When he saw defendant matched the description of the shooter, Deputy McCowan asked if he could talk to him, to which defendant said, "sure." As defendant approached, Deputy McCowan asked him to remove his hands from his pockets and defendant complied. Deputy McCowan then asked if he had any weapons and if defendant minded if he checked. Defendant replied, "no, go ahead," so Deputy McCowan conducted a patsearch. Deputy McCowan believed this occurred around 1:25 a.m.

Although Deputy McCowan did not find any weapons during the patsearch, he "felt a number of objects in his pockets," but did not remove any of those items at that point. Deputy McCowan then asked defendant if he had any identification, and whether he had any knowledge of the earlier altercation at the apartment complex. Defendant presented a DMV paper printout with a photostatic picture. Deputy McCowan continued to converse with defendant for approximately five minutes, during which time defendant said he was heading to his girlfriend's apartment, which defendant identified as apartment No. 8. Because this was

the same apartment number linked to the suspected shooter, Deputy McCowan testified he "had reason to believe [defendant] was probably the suspect we were looking for in the shooting." Deputy McCowan then "detained" defendant and conducted a records check. At approximately 1:45 a.m., Deputy McCowan learned defendant was on parole and had an extensive criminal history for weapons and robbery charges.

Deputy McCowan relayed the status of the situation to his sergeant at approximately 1:50 a.m.; the sergeant responded that he was talking with the persons who witnessed the shooting and was considering conducting a field show up. About 2:10 or 2:15 a.m., however, Deputy McCowan's sergeant advised him "that the initial witnesses were fearful for their safety, did not want to become involved and did not want to participate in the field show-up" with defendant. During the time Deputy McCowan was with defendant and awaiting information on the field show up, other deputies were investigating the crime scene and speaking to defendant's girlfriend.

A crime scene investigator collected gunshot residue samples from defendant around 2:20 a.m., a process which took about 10 minutes. At approximately 2:44 a.m., Deputy McCowan contacted defendant's parole agent, Eric Sakazaki, who placed a parole hold on defendant based on the information he received from Deputy McCowan. However, Agent Sakazaki did not authorize a further search of defendant's person or property.

Based on the parole hold, Deputy McCowan conducted an inventory search of defendant between 2:45 and 2:50 a.m., at

which time he removed a set of keys from defendant's pocket. The keys were attached to a keyless remote entry system, which the deputies could use to attempt to locate defendant's car. Upon discovering a means to locate the car, Deputy McCowan gave the keys and remote to Deputy Jeff Long who went through the parking lot clicking the remote to see which car responded.

During this time, Deputy Stacy Jaquith spoke with defendant's girlfriend, Victoria Thomas, the female found walking with defendant in the parking lot. Thomas gave Deputy Jaquith a statement about what happened that night. Shortly after 2:50 a.m., Deputy Jaquith informed Deputy McCowan that Thomas implicated defendant in the shooting; however, this was after Deputy McCowan had searched defendant's pockets. Additionally, Thomas gave deputies information about the location of the black Mustang.

Based on the information provided by Thomas, deputies found the black Mustang immediately south of the apartment complex. The Mustang was registered to defendant. Deputy McCowan later learned that deputies found a revolver or pistol inside the trunk of the car.

#### PROCEDURAL BACKGROUND

On December 17, 2004, defendant filed a motion to suppress evidence pursuant to Penal Code section 1538.5. Defendant sought to suppress the firearm and bullets found in his car, as well as any information relating to the gunshot residue testing the police performed on him.

Defendant based his motion to suppress on five arguments:

(1) "the detention violated the Fourth Amendment because the officers lacked sufficient information to identify the defendant as a person involved in criminal activity"; (2) "the pat-down was unlawful because the officer did not have a reasonable suspicion that defendant was armed"; (3) "even if the initial detention was permissible, the subsequent search was unlawful because it was the result of an unduly prolonged detention"; (4) "the proper standard for determining the legality of a parole search under the Fourth Amendment of the United States Constitution is 'reasonable suspicion'"; and (5) "the parole search of the defendant was conducted without 'reasonable suspicion' and was therefore illegal."

On January 5, 2005, the trial court denied defendant's motion to suppress. The court found there was a "very powerful description" of the suspect based on "a specific reference to a specific person." According to the court, the description of the suspect was consistent with defendant's size and age. Furthermore, defendant had the "appropriate black leather jacket" and was "clearly connected to apartment eight." Thus, the court was of the opinion that "an officer would have been justified in making an arrest based solely on finding [defendant] there in that situation."

Although the deputies did not arrest defendant upon their initial contact with him, the court found "[t]here certainly was a basis for a significant detention to investigate." Furthermore, the court concluded the deputies had a right to

search defendant once they learned he was on parole. The court acknowledged that all parolees are searchable and the deputy believed he could search defendant freely once he knew defendant was on parole. Thus, it was permissible, based on defendant's parole status, to perform gunshot residue testing on defendant and to search defendant's car. Accordingly, the court determined all of the deputies' actions were lawful and found "no basis" to suppress any of the evidence.

Trial began on January 12, 2005. The amended information filed on January 7, 2005, charged defendant with five counts relating to the shooting of Jose Vasquez that occurred on September 30, 2004. In addition, the amended information alleged defendant had a prior serious felony conviction and two convictions for which he served time in state prison.

The People called numerous witnesses to testify at trial, including Thomas and two residents of the apartment complex near the shooting, Niko Housley and Jimmy Yarbrough. All three witnesses testified they saw defendant shoot an individual on September 30, 2004. Although defendant conceded he was guilty of possession of a firearm by a convicted felon and carrying a concealed weapon, he argued the evidence did not support a finding that he was guilty of assault with a firearm and negligent discharge of a firearm.<sup>1</sup> To reach this result,

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<sup>1</sup> The court dismissed count four, carrying a loaded firearm in a public place, during trial.

defendant attacked the credibility of the three eyewitnesses and argued there were numerous inconsistencies in their testimony.

During rebuttal closing argument, the prosecutor attempted to rationalize inconsistencies in the testimony of the three eyewitnesses and refute any claim of fabrication. He stated, "Thank goodness they're -- to use their words -- all over the board. That shows us that they are not putting their heads together and cooking this thing up. Thank goodness there are inaccuracies or discrepancies in their testimony. They're thinking back of things that happened in September, and they're giving us their honest answer of where they remember the people. [¶] But the thing about this thing that they can't answer and that there is no answer for is that the two groups of people don't talk."

At this point, defense counsel objected, contending the prosecutor's argument shifted "the burden to the defense to prove lack of guilt." The trial court disagreed, responding, "I don't sense that is what the argument is doing. Obviously the burden is on the People, but I don't think the argument shifts the burden. It is acceptable comment." The prosecutor concluded this line of argument by stating: "This is the People's opportunity to respond to argument. They have not explained anything and they don't have to explain anything. They can sit down there and shut their mouth and not argue a word."

Later in closing argument, the prosecutor addressed defendant's contention that Thomas testified because of her



desire to avoid her two outstanding warrants and charges for making false statements to police. He stated the district attorney's office did not make these warrants go away, they just provided her with the information necessary to handle the matter.

Regarding the misdemeanor false statements to the police, the prosecutor stated, "Is it a good thing to lie to the police? Absolutely not. But when you look at what she's a witness to, she's a witness to a shooting. She's a witness to a man who got shot walking down the street for no reason. Are we going to give her immunity? You bet we are. We'll do it today and we'll do it tomorrow. That's the right thing to do. If you don't get that testimony out, we don't know what happens. If we don't know what happens, we can't convict the people [who] are out shooting innocent people on the street."

Defendant objected: "That has to do with policy issues, and you can't convict people out on the street. I think we have to focus to the facts of this case."

The court overruled the objection, stating, "Well, obviously -- obviously you're not to convict someone as a matter of policy, because people do get shot in the streets. That obviously -- the issue in this case is, is there evidence that proves and satisfies the jury. . . . [I] don't feel this is a significantly questionable argument. I'll permit the argument but emphasize you're not to decide this case on public policy or because of some perception of crime in the street."

The jury found defendant guilty of assault with a firearm, possession of a firearm by a convicted felon, carrying a concealed weapon, and negligent discharge of a firearm. Furthermore, the jury found that defendant did personally use a firearm in the commission of the assault; however, as to the assault, the jury did not find defendant personally inflicted great bodily injury.

On February 25, 2005, in a bifurcated proceeding, the trial court found the three prior convictions alleged in the amended information were true, after defendant waived a jury trial on the matter. As relevant here, the court found that on March 4, 1994, defendant was convicted of robbery in violation of Penal Code section 211, based on the information contained in People's exhibit No. 46. Exhibit No. 46 was comprised of various minute orders, a complaint, an amended complaint, and a minute order and order of probation from *People v. Glass* (Super. Ct. Sac. County, 1994, No. 93F09430). The court also found the robbery qualified as a prior serious felony conviction within the meaning of Penal Code sections 667 and 1170.12.

The court sentenced defendant to a total of 17 years in state prison, including five years for the prior serious felony and one year for each of the prior convictions. He received three years for the assault with a firearm count, which was doubled to six years because of the prior felony strike, and four years for the negligent discharge of a firearm.

## DISCUSSION

### I

#### *Motion To Suppress*

When reviewing a trial court's denial of a motion to suppress, "We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

On appeal, defendant contends, "the trial court erred in denying the suppression motion because the prosecution did not prove that the parole search of appellant was not unconstitutionally arbitrary." A portion of this argument, however, is premised on defendant's assertion that Deputy "McGowan was not justified in holding appellant for nearly and [sic] hour and twenty minutes before making any determination as to his status."<sup>2</sup> As far as we can discern, this latter argument

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<sup>2</sup> Defendant's counsel conflates the two separate protections of the Fourth Amendment "against unreasonable searches and seizures." (U.S. Const., 4th Amend.) A portion of defendant's opening brief reads: "Where the motivation is unrelated to rehabilitative and reformatory purposes or legitimate law enforcement purposes, the search is 'arbitrary'. . . . Therefore, the prolonged *detention* of appellant would be 'arbitrary.'" (Italics added.) However, a search and detention are not the same, nor are they subject to the same analysis. (See, e.g., *Florida v. Royer* (1983) 460 U.S. 491, 497-501 [75 L.Ed.2d 229, 236-239] [providing a general overview of search and seizure analysis].)

attacks the length of the detention as unreasonable, not whether the parole search was arbitrary. Accordingly, it should be separately designated under its own heading. (See Cal. Rules of Court, rule 14(a)(1)(B) [an appellant must "state each point under a separate heading or subheading summarizing the point, and support each point by argument"].) Nonetheless, we will analyze the two arguments individually.

A

*The Detention*

"Police contacts with individuals may be placed into three broad categories ranging from the least to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on an individual's liberty." (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.)

The People concede Deputy McCowan's initial contact with defendant was a detention; however, they assert it was justified by the suspicion raised by "appellant's appearance matching that of the shooting suspect."

"The Fourth Amendment to the United States Constitution prohibits seizures of persons, including brief investigative stops, when they are 'unreasonable.'" (*People v. Souza* (1994) 9 Cal.4th 224, 229.) "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the

person detained may be involved in criminal activity." (*Id.* at p. 231.)

Sacramento County Sheriff's deputies responded to a 911 call reporting that a person had been shot. While deputies surveyed the apartment complex parking lot near the scene of the crime, they encountered only two individuals -- defendant and his girlfriend. Deputy McCowan testified defendant matched the description of the shooting suspect he received from dispatch -- black male adult, five feet seven inches to five feet nine inches tall, with a heavy build, wearing a black leather jacket and dark jeans. The description of the shooter was received from an identified source, a witness to the shooting who provided her name and apartment number. Because defendant matched the precise description of the shooting suspect, which was received from a reliable source, Deputy McCowan clearly had sufficient reason to believe defendant was involved in criminal activity to justify the initial detention.

Defendant further argues that Deputy McCowan was not justified in holding him for 1 hour and 20 minutes. However, "[t]here is no hard and fast line to distinguish permissible investigative detentions from impermissible de facto arrests. Instead the issue is decided on the facts of each case, with focus on whether the police diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances.'" (*People v. Celis* (2004) 33 Cal.4th 667, 674-675.) In making this determination, it is

important to examine the "'duration, scope and purpose' of the stop." (*Ibid.*)

Deputy McCowan made initial contact with defendant at approximately 1:25 a.m. He asked defendant to remove his hands from his pockets and performed a brief patsearch for weapons with defendant's consent. Even without defendant's consent to the frisk, this was an entirely permissible action to ensure officer safety, given that defendant matched the description of the shooter and considering the violent nature of the crime under investigation. (See *Terry v. Ohio* (1968) 392 U.S. 1, 30 [20 L.Ed.2d 889, 911].)

Subsequently, Deputy McCowan requested that defendant provide him with identification and proceeded to ask defendant whether he knew of the earlier altercation at the apartment. During their conversation, defendant told Deputy McCowan that he was headed to the same apartment number linked to the shooting suspect, furnishing additional reason to believe defendant was involved in the shooting. (See *People v. Russell* (2000) 81 Cal.App.4th 96, 102 ["Circumstances which develop during a detention may provide reasonable suspicion to prolong the detention"].) At this point there was compelling evidence linking defendant to the shooting, arguably sufficient to arrest defendant, but clearly enough to detain him for further investigation.

At approximately 1:45 a.m., Deputy McCowan received information from the background check he requested on defendant, at which time he learned defendant was on parole. Subsequently,

around 1:50 a.m., Deputy McCowan informed his sergeant of the current situation. The sergeant replied that he was talking to the witnesses and inquiring into doing a field show up to get a positive identification whether defendant was the shooter. It was not until 2:10 or 2:15 a.m. that Deputy McCowan learned the witnesses were fearful for their safety and declined to do a field show up. During the time Deputy McCowan was awaiting the field show up, and after learning it would not happen, the other deputies on the scene continued to investigate the crime. All of these procedures were aimed at confirming or dismissing whether it was defendant who was involved in the shooting. It was proper for the deputies to attempt to have the eyewitnesses identify defendant as the shooter, or exculpate him from involvement. When this alternative appeared fruitless, the deputies continued their investigation and pursued other avenues.

Approximately five minutes after learning there would be no field show up, a crime scene investigator took gunshot residue samples from defendant. This action constituted a search of defendant, as further discussed below. Although the results would not be immediately available to confirm whether defendant was involved in the shooting, it did preserve potential evidence and lasted only 10 minutes. Thus, the procedure did not unreasonably prolong the detention.

Finally, Deputy McCowan contacted defendant's parole agent, Eric Sakazaki, to request he place a parole hold on defendant given the circumstances of the crime, including defendant's

appearance and statements making it likely he was the suspected shooter. Agent Sakazaki placed a parole hold on defendant at approximately 2:44 a.m.

Throughout each step of the investigatory detention, deputies acted in an effort to confirm or dispel suspicion that defendant was the suspected shooter. There was no unreasonable period of inactivity where the deputies failed to diligently pursue their investigation. Nothing was unreasonable about the scope of the detention, as it appears from the record that Deputy McCowan conversed with defendant throughout the entire process, without ever restraining him or using force. In addition, considering the serious nature of the crime and how closely defendant matched the description of the shooter, it would have been irrational for deputies to release defendant without completing their investigation.

The United States Supreme Court has continually recognized that a seizure is not unreasonable merely because "the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means." (*Cady v. Dombrowski* (1973) 413 U.S. 433, 447 [37 L.Ed.2d 706, 718]; *United States v. Montoya De Hernandez* (1985) 473 U.S. 531, 542 [87 L.Ed.2d 381, 392].) "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." (*United States v. Sharpe* (1985) 470 U.S. 675, 687 [84 L.Ed.2d 605, 616].) Considering the totality of the circumstances, we do not find Deputy McCowan acted unreasonably by detaining defendant to



investigate a violent shooting where defendant was a near perfect match to the eyewitness description of the suspected shooter.

B

*The Search*

Defendant further argues the trial court erred by denying his motion to suppress evidence because "the prosecution failed to prove that the parole search was not unconstitutionally arbitrary." Defendant contends the prosecution failed to prove, through objective facts, that Deputy McCowan's motivation in conducting the parole search "'could have been related' to rehabilitative and reformatory purposes or legitimate law enforcement purposes." We disagree.

The Fourth Amendment to the United States Constitution protects against unreasonable searches, in addition to unreasonable seizures. (U.S. Const., 4th Amend.) A warrantless search is presumed to be unreasonable, unless the search meets one of the few recognized exceptions. (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 372 [124 L.Ed.2d 334, 343-344].) The search of a parolee is one such exception. (See *United States v. Knights* (2001) 534 U.S. 112, 121 [151 L.Ed.2d 497, 507]; *People v. Reyes* (1998) 19 Cal.4th 743, 753.)

In *Reyes*, the California Supreme Court held that, even in the absence of particularized suspicion, a parole "search is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing." (*People v. Reyes, supra*, 19 Cal.4th at p. 753.)

Deputy McCowan learned defendant was on parole at 1:45 a.m. Neither party disagrees that the gunshot residue testing of defendant constituted a search of his person. However, this occurred at approximately 2:20 a.m., well after Deputy McCowan learned defendant was on parole. Deputy McCowan searched defendant's pockets and removed a set of keys and keyless remote to defendant's car, which deputies attempted to use to locate the car. Both the search of defendant's pockets and subsequent search of his car occurred after deputies learned that defendant was on parole. Thus, these were all valid parole searches so long as they were conducted for a proper purpose.<sup>3</sup>

Defendant concedes the parole search was conducted for the purpose of locating the shooter and investigating a serious crime. Nonetheless, he argues "[s]ince the prosecution clearly failed to justify the parole search with evidence that Deputy McCowan's motivation was or could have been related to rehabilitative and reformatory purposes or legitimate law enforcement purposes, the trial court should have found the parole search unconstitutionally arbitrary." This argument makes no sense.

Deputy McCowan clearly had a legitimate law enforcement purpose to justify each search of defendant's person and

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<sup>3</sup> The search of defendant's pocket could have been justified as an inventory search and the search of defendant's car could have been justified by probable cause based on information supplied by defendant's girlfriend implicating him in the shooting. Because we find all were proper parole searches, we need not reach the remaining justifications.

property. Deputies were investigating the violent shooting of a person. They found defendant near the scene of the crime, early in the morning, clearly matching the description of the shooter they received from an identified eyewitness who called 911. While performing a records check on defendant, Deputy McCowan learned defendant was on parole. Based on all of this information, there was nothing "arbitrary or capricious" about the parole search of defendant. (*People v. Reyes, supra*, 19 Cal.4th at pp. 753-754, citing *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1004, ["a search is arbitrary and capricious when the motivation for the search is unrelated to rehabilitative, reformatory or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee"].) Deputy McCowan had reason to believe defendant was involved in the shooting. He knew defendant was on parole. Therefore, the parole searches were performed for the legitimate law enforcement purpose of investigating the shooting. Accordingly, we conclude the denial of defendant's motion to suppress was proper.

## II

### *Prosecutorial Misconduct*

Defendant claims that during closing argument, the "prosecutor, . . . committed misconduct by shifting the burden of proof to [defendant] to prove his innocence and urging the jury to convict [defendant] to send a message that society will not tolerate people shooting innocent victims on the street."

We find neither of the prosecutor's statements, taken in context, constituted misconduct.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, and particularly pertinent here, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) Acts of prosecutorial misconduct do not justify reversal of a defendant's conviction "unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

Regarding the burden-shifting argument, defendant specifically stresses the alleged impropriety of the following statement by the prosecutor: "But the thing about this thing that they can't answer and that there is no answer for is that the two groups of people don't talk." The prosecutor concluded this line of argument by stating: "This is the People's opportunity to respond to argument. They have not explained

anything *and they don't have to explain anything*.<sup>[4]</sup> They can sit down there and shut their mouth and not argue a word."

(Italics added.) However, we cannot view these statements in isolation; instead we must evaluate them in the context in which they were made. (*People v. Morales, supra*, 25 Cal.4th at p. 46.)

Here, the prosecutor sought to rebut defendant's accusation that the testimony of the eyewitnesses was inconsistent and essentially fabricated. The prosecutor made the above statements to demonstrate that if the jury viewed defendant's ex-girlfriend and the other two eyewitnesses as being in two separate groups, it would be impossible for the two groups to fabricate such similar stories because they did not talk to each other. Thus, these statements did not even address defendant's guilt, but rather the claim of collusion concerning the People's eyewitnesses. Moreover, while overruling defendant's objection to the statement, the court made it clear that the burden was on the People. Following defendant's objection, even the prosecutor made clear that the defendant had no duty to explain anything or make any argument. Clearly, there is no likelihood that the jury took these statements to mean the burden of proof was on defendant to prove his innocence.

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<sup>4</sup> We note in an argument on misconduct, defendant's opening brief failed to include the italicized portion of the prosecutor's argument, making the statement appear far worse than the argument actually before the jury.

Second, defendant argues that the prosecutor urged the jury to convict defendant based on public policy grounds. Specifically, defendant highlights the following statement made by the prosecutor: "Are we going to give her immunity? You bet we are. We'll do it today and we'll do it tomorrow. That's the right thing to do. If you don't get that testimony out, we don't know what happens. If we don't know what happens, we can't convict the people [who] are out shooting innocent people on the street."

Here, the prosecutor was responding to defendant's allegation that Thomas testified for the People to avoid her two outstanding warrants and charges for making false statements to police. He began by explaining that the district attorney's office did not "take care" of her warrants, they only explained to her how she could resolve the matter.

The argument defendant focuses on was made by the prosecutor in response to defendant's second attack on Thomas's credibility regarding the immunity she received to testify. Viewed in context, the prosecutor was explaining the benefits of offering immunity to encourage a witness to testify. He posited that granting immunity to witnesses allows their testimony to be heard so that evidence can be presented to convict people who commit crimes. Although he may have been appealing to the sympathy of the jury by focusing on "innocent people" who get shot, we do not find the statement went so far as to suggest that the jury should convict defendant based on public policy. The broader implication of the statement was that granting

immunity allows the state to prosecute people who commit crimes. It is perfectly acceptable argument for the People to justify their decision to grant Thomas immunity for her testimony. As such, we find no misconduct in these statements.<sup>5</sup>

### III

#### *Prior Conviction*

Finally, defendant argues that the People presented insufficient evidence to establish beyond a reasonable doubt that he sustained a prior serious felony conviction for robbery. Defendant challenges the admission of People's exhibit No. 46 which consisted of various minute orders, a complaint, an amended complaint, and a minute order and order of probation.

Although the trial court's finding as to the prior conviction was based on documents contained in People's exhibit No. 46, defendant argues it was error to rely on the exhibit because it was not part of the record "*leading to the imposition of judgment.*" (Italics added.)

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<sup>5</sup> We note the trial court took action to insulate the jury from any impropriety which possibly could have been derived from the prosecutor's statements. After defendant objected to the both lines of argument by the prosecutor, the trial court instructed the jury on the law regarding each issue -- specifically, that the People had the burden of proof and the jury could not decide the case based on public policy. We presume "the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (*People v. Sanchez* (1995) 12 Cal.4th 1, 70.)

The defendant's argument that the court cannot consider evidence developed subsequent to the prior conviction has no basis in law.

In *People v. Guerrero* (1988) 44 Cal.3d 343, the California Supreme Court held that "in determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction." However, the court did not resolve the question of what constitutes the "record of conviction." (*Id.* at p. 345.)

Defendant relies in part on a statement by the California Supreme Court in *People v. Myers* (1993) 5 Cal.4th 1193, 1195, that "the trier of fact may consider the entire record of the proceedings leading to imposition of judgment on the prior conviction . . . ." Contrary to defendant's contention, this holding did not create a bar to evidence subsequent to the judgment. The court in *Myers* did not limit the rule established in *Guerrero*, but was merely applying the same rule to a case involving a prior conviction from another state. (*Myers*, at p. 1195; see also *People v. Woodell* (1998) 17 Cal.4th 448, 453 ["In *People v. Myers* [citation], we held that the rule of *People v. Guerrero* [citation], applies to out-of-state convictions as well as to California convictions"].)

The California Supreme Court has left open the issue of whether the record of conviction should be construed "technically, as equivalent to the record on appeal" or "more narrowly, as referring only to those record documents reliably reflecting the facts of the offense for which the defendant was



convicted." (*People v. Reed* (1996) 13 Cal.4th 217, 223; see *People v. Woodell, supra*, 17 Cal.4th at p. 454.) However, People's exhibit No. 46 falls within either definition. (See *People v. Gonzales* (2005) 131 Cal.App.4th 767, 773 ["The 'record of conviction' includes the charging document and court records reflecting defendant's admission, no contest plea, or guilty plea"].)

Defined technically, the record of conviction is analogous to the record on appeal, "specifically, any items considered a normal part of the record under California Rules of Court, rule 33 [currently rule 31] . . . ." (*People v. Abarca* (1991) 233 Cal.App.3d 1347, 1350.) Furthermore, the documents in exhibit No. 46 meet the narrower definition of the record of conviction requiring "documents reliably reflecting the facts of the offense for which the defendant was convicted." (*People v. Reed, supra*, 13 Cal.4th at p. 223.) This is not a case where the underlying details of the prior conviction need to be examined to determine whether the prior conviction qualifies as a serious felony. Because defendant's prior conviction was for robbery, the fact of the conviction alone will suffice to bring the prior conviction within Penal Code sections 667 and 1170.12. (See Pen. Code, §§ 667, subd. (c), 1170.12, subd. (b)(1), 1192.7, subd. (c)(19) [listing "robbery," without qualification, as a serious felony].) The minute order and order of probation, along with the amended complaint, "reliably reflected" the fact that defendant pled no contest to one count of robbery in violation of Penal Code section 211. Accordingly, we find no

error in the trial court's determination that defendant was convicted of a prior felony.

DISPOSITION

The judgment is affirmed.

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ROBIE, J.

We concur:

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MORRISON, Acting P.J.

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BUTZ, J.